

555 CAPITOL MALL
10TH FLOOR
SACRAMENTO, CA 95814-4686
TELEPHONE (916) 441-0131
FAX (916) 441-4021

KEVIN M. O'BRIEN

November 20, 2000

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-0200

Re: November 27, 2000 Public Meeting re Improving the Water Right Process
and Procedures

Dear Mr. Schueller:

The Legal Affairs Committee of the Association of California Water Agencies ("Committee") respectfully submits these comments and recommendations in connection with the above-referenced public meeting.

INTRODUCTION

The Committee appreciates the efforts of the State Water Resources Control Board ("SWRCB") and the Division of Water Rights ("Division") to improve the water right process. Given the increasing imbalance between water supply and demand within California and the concomitant need to both "stretch" existing supplies and develop new supplies, it is vitally important that the water right process function efficiently and effectively. While the existing water right process functions well in certain respects, the Committee believes that the process can and should be improved significantly.

Members of the Committee and others participated in a similar process to review water right procedures during 1994-95. Frankly, the results of the earlier process have been highly disappointing. Members of the Committee participated in a series of stakeholder meetings which generated comprehensive recommendations for change in the water right process. While some of the recommendations have been implemented, the vast majority of this earlier work of the stakeholder group has been ignored. The Committee trusts that the SWRCB

and the Division are now committed to the goal of meaningful reform of the water rights process.

COMMENTS AND RECOMMENDATIONS

1. General Water Right Issues

A central issue in the review of water right administration in California is the proper definition of the role of the SWRCB and the Division in the water right process. The Committee strongly believes that the principal role of the SWRCB and the Division should be that of neutral arbiter, or judge, of water right controversies. The Committee further believes that staff of the SWRCB and the Division often have deviated from the role of neutral arbiter and adopted other roles, including those of planner and advocate. This shift away from neutrality has, in recent years, resulted in a good deal of polarization between the water purveyor community and the SWRCB. Re-establishing the credibility of the SWRCB and the Division as fair and impartial decision-makers is the single most important reform that is needed in the water right process.

The need for strict neutrality is particularly evident in cases where the SWRCB and the Division are called upon to resolve controversies in which “sister” state agencies (for example, the Department of Water Resources and the Department of Fish and Game) or federal agencies (for example, the Bureau of Reclamation, the Fish and Wildlife Service and the National Marine Fisheries Service) are participants. From the standpoint of the water purveyor community, the opinions, conclusions and recommendations of other state and federal agencies frequently appear to receive greater weight in the water right process than those of other participants. This needs to be changed. The SWRCB and the Division should apply the same test in reviewing the positions of all parties to the water right process: is the position supported by rigorous and sound science and substantial evidence?

Strict neutrality must be a core value not only for the members and senior management of the SWRCB and the Division but also for the staff who are “in the trenches” dealing with the public on a daily basis. There has at times been a disconnect between the self-perceived role of SWRCB members and senior management, on the one hand, and staff on the other. The Committee perceives that, at times, the two groups are not “rowing in the same direction.” The goal of strict neutrality (and the concomitant public respect for the credibility and

professionalism of the SWRCB as an organization) can be achieved only if *all* agency personnel see their role as neutral and impartial arbiters of the evidence.

2. Application and Petition Processing

The Committee recognizes that the Division has made significant efforts in recent years to improve procedures for processing water right applications and petitions. Nonetheless, timeframes for processing water right applications and petitions remain excessive. The Division should continue to seek opportunities to streamline the application and petition processes.

Many of the problems associated with application and petition processing arise from issues of inadequate staffing, staff turnover and inadequate training. The Committee recognizes that these issues relate directly to funding constraints and it commends Division management for recent efforts to address these problems. But more can be done. The practice of allowing applicants or petitioners to pay for the hiring or retention of additional staff to expedite processing of certain applications or petitions tends to undermine public perception of the SWRCB's impartiality and objectivity, and should be avoided.

The application and petition processes would benefit greatly from the establishment of mandatory time requirements to which applicants, petitioners, protestants and staff would be held accountable. Different applications and petitions should be subject to different time requirements depending on the level of complexity of the application or petition and the protests. The Division should implement a system analogous to the "fast track" system utilized by California state trial courts, under which cases are assigned an order of priority based on complexity and various mandatory time requirements are imposed. The Committee would gladly work with Division staff to develop such a system tailored to the water rights process.

To address the problems that often arise at the beginning of the process, the SWRCB should adopt regulations that clearly specify the minimum requirements for new water-right applications and petitions. If an application satisfies these requirements, then it should immediately be accepted and given an application number. If a petition satisfies these requirements, then it should immediately be accepted. In recent years, new applications and petitions often have sat for many months in the Division without any initial decisions on acceptance.

Once an application or petition is accepted, the Division should proceed promptly to issue the public notice for the application or petition (with a specified deadline for protests), or, if necessary, inform the applicant or petitioner about what additional documentation must be submitted before the public notice can be issued. In recent years, the public notices for many new applications and petitions have not been issued until many months, or even years, after the application or petition was filed.

The SWRCB and the Division should take a more proactive approach to narrowing the issues to be resolved through hearings. By analogy to the active management of cases that occurs in the federal courts, major water right applications and petitions should be assigned an SWRCB hearing officer early in the process and that officer should have discretion to conduct mandatory pre-hearing processes including procedures analogous to summary judgment procedures utilized by courts. The SWRCB should use its authority under Water Code section 1335 more often to require protestants to substantiate their protests, and, if they do not, to dismiss or limit the protests. Too often, protests are filed with no technical or legal support and then allowed to remain pending for years.

More coordination is needed between Division engineering and environmental unit staff. Too often, engineering and environmental staff do not appear to work closely as a team on applications or petitions, sometimes resulting in conflicting direction. Early communication between environmental unit staff and applicants (and environmental consultants) is critical in order to avoid later disputes regarding the appropriate scope of environmental review.

Applicants, petitioners, and the SWRCB staff would all benefit from having the collected opinions of the Board's Chief Counsel concerning water rights matters available for review (including posting on the SWRCB's website). Access to these opinions would facilitate research work by all participants and contribute to efficiency of the process.

Finally, the SWRCB should clarify policy regarding applicability of the municipal preference (Water Code §§ 106, 106.5) particularly as it relates to the granting of extensions of time to municipalities consistent with the preference.

3. Compliance/Enforcement

Similar to the application and petition processes, timeframes for processing compliance and enforcement proceedings remain excessive. The

Committee recommends adoption of a system similar to that suggested above for the processing of applications and petitions, in which complaints are assigned a priority based on level of complexity and mandatory time requirements are imposed.

Too often, complaints are filed with little or no technical or legal support and are then allowed to remain pending in the complaint unit for years while the complainant attempts to gather evidence in support of the complaint. Complaints should be subject to a rigorous initial screening; those that lack technical and/or legal support should be promptly dismissed. Where a complaint is deemed to be adequate during the initial screening process, formal and active case management by the SWRCB should be conducted, preferably under the supervision of the designated hearing officer.

Finally, the Division should refrain from attempting to invoke its authority to assess administrative civil liability (“ACL”) in situations where a party has filed an application to appropriate while reserving the position that the division and use of water is authorized under pre-existing rights such as riparian or pre-1914 rights.

4. Hearings

The Committee believes that the greatest bottleneck in the water-right process (and thus the greatest opportunity for increased efficiency) occurs at the hearing stage of the process. In many instances hearings at the SWRCB are more lengthy and complex than is reasonable or necessary. Through better training of hearing officers and more formalized pre-hearing procedures, the hearing process can be streamlined without the erosion of due process protections.

As already discussed, hearing officers should draw from the lessons learned by state and federal judges and should take an active role in pre-hearing case management. SWRCB regulations should be amended to specify pre-hearing procedures. Pre-hearing settlement conferences should be required, following the model established in CEQA litigation. Such conferences should be conducted by a person trained in mediation techniques who is not a member of SWRCB or Division staff and who will not be involved in any future aspects of SWRCB or Division decision-making on the matter.

Case management conferences should be held prior to the hearing to narrow the issues to be addressed at hearing and to obtain concurrence of the

parties as to the key hearing issues. The current system, whereby key hearing issues are developed by Division staff without significant input from hearing participants or the hearing officer, is irrational and inefficient. Procedures akin to summary judgment/summary adjudication procedures should be developed to enable the hearing officer to determine, in advance of the hearing, whether substantial issues of material fact exist as to specific issues.

Procedures for the conduct of hearings should also be improved. Hearing officers and staff counsel should receive formal training in hearing procedures and the rules of evidence, through the Office of Administrative Hearings or another agency with expertise in adjudicatory hearings. Clear rules concerning *ex parte* communications should be adopted. At hearings, legal arguments relating to evidentiary objections should be brief and to the point. Too often, parties are allowed to expand arguments on evidentiary issues into arguments on the merits. Strict rules should be developed on the use of rebuttal evidence. Too often, rebuttal evidence is used to avoid the SWRCB's rules regarding pre-submittal of evidence. The filing of a timely protest should be a prerequisite to participation in a hearing as a party.

A serious problem has arisen in the past when the Division has had some staff members participate in a water-rights hearing as advocates, while other staff members have participated in the same hearing as advisors to the hearing officer and the SWRCB. Because all of the Division staff work closely together during their day-to-day work, and because the SWRCB almost always ends up adopting the position forwarded by the staff advocates, this process has seriously undermined the neutrality and impartiality of the SWRCB. The Division should avoid this practice in most cases, and, if the Division believes that staff advocates are needed in a particular case, then the Division should issue a public notice clearly explaining the basis for this conclusion and the specific role of the staff advocates at the hearing. The SWRCB should adopt strict rules, akin to "ethical walls" used by law firms, to ensure separation between staff advocates and the Board, the hearing officer, and the staff which support them. Staff advocates should be subject to the same rules regarding pre-submittal of testimony, etc. that apply to other witnesses.

Full disclosure, and the opportunity for public comment, should be afforded the general public before the SWRCB or the Division retains outside experts in connection with any proceeding. If the analysis of outside experts is considered or relied upon, such experts must be made available for cross-examination during the hearing process.

Mandatory time deadlines for the issuance of proposed decisions following hearings should be imposed. The Committee recommends that SWRCB hearing officers be subject to the same 90-day deadline for issuance of a proposed decision that applies to state trial courts.

CONCLUSION

The Committee appreciates the opportunity to submit these comments and looks forward to working with the SWRCB and Division in implementing these and other recommendations.

Sincerely yours,

DOWNEY, BRAND, SEYMOUR & ROHWER LLP

KEVIN M. O'BRIEN

KMO:kmo

#355257.1

cc: Robert B. Maddow, Chair
ACWA Legal Affairs Committee